is determined by Congress when they passed the law. They set a maximum sentence that may be imposed in any case. The Judge, under the law, is permitted to impose anything from a term of probation or a fine up to the maximum term of imprisonment that Congress has set. In other words, it's all a matter of human judgment on the part of the Judge just as in the instance of determining guilt or innocence it is a matter of human judgment on the part of a jury and of course, in performing the responsibility that is yours, which is to determine guilt or innocence, you Ladies and Gentlemen are vitally concerned that your verdict speak the truth.

APPENDIX

(Excerpt from Jury instructions, IV Tr. 286-288)

Now you Ladies and Gentlemen are not concerned with the possible consequences of your verdict, and of course, by possible consequences, I mean possible punishment. Under the laws passed by Congress which created this Court and which assigned to you Ladies and Gentlemen the duty of determining guilt or innocence, the duty of determining [sic] what sentence is to be imposed on any person who is convicted either by a jury or by his plea of guilty, is given to the Judge of the Court. Now, even though that is not your responsibility, by your questions you have indicated some interest in how the Court goes about performing its duty. Let me explain to you, generally speaking, in every instance in which any person is convicted of a crime in this Court or any similar United States Court, that would be because he pled guilty or was convicted by jury, there is a set procedure by which the Court goes about performing its duty. We don't do that without hearing the facts the same as the jury does not determine guilt or innocence without hearing the facts. We get our facts from an investigation by our probation officer. He talks to the defendant, writes down whatever the defendant wishes to say to the Court, he then goes about investigating the background of the defendant from the day he is born up until the present time and he writes it all up in a typewritten report and gives the defendant and his lawyer a copy of it, gives a copy to the Judge and we then assemble in the Courtroom whenever that is all accomplished and hear from the defendant and his lawyer and anybody else that they want to bring with them as to what sentence should be imposed and it is only at that moment the Judge makes a judgment as to what the sentence should be. The range of sentence that may be imposed by the Court

The court of appeals properly held (id. at A19-A20) that, although "no reference to sentencing whatsoever" is the preferable practice, the reference to sentencing in this case did not deprive petitioner of a fair trial.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1983

DOJ-1983-08

Finally, Section 5848(b) expressly provides that the exclusionary rule of subsection (a) does not apply to a prosecution "under any applicable provision of law with respect to the furnishing of false information." The illegality of the importation at issue involved the fraudulent obtaining of permission to import based on false statements. Thus, as the court of appeals concluded (Pet. App. A23), "[t]he importation violation [under 18 U.S.C. 545] is clearly 'with respect to' a prosecution for furnishing false information."[10]

5. Petitioner's final contention (Pet. 45-50) is that his convictions should be reversed because, in response to questions from the jury, the trial court made a reference to sentencing in its jury instructions.[11] That contention does not warrant review. As the court of appeals explained (Pet. App. A19):

> [T]he judge's reference to sentencing concerned the range of potential punishment, without referring to a specific maximum other than that delineated by Congress. The judge in no way intimated what punishment he might be inclined to give. He also consistently informed the jury that potential punishment was not their concern; they were only to look for the truth and provide a verdict according to what the evidence demonstrated.

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[10]Petitioner contends (Pet. 45) that the court of appeals' analysis allows him to "stand convicted of making false statements to bring the guns into the United States and * * * for [importing the guns] by making the same false statements," in violation of the Double Jeopardy Clause. That contention is without merit. The statutes involved are distinct and require different elements of proof. See Brown v. Ohio, 432 U.S. 161, 166 (1977).

[11]The instructions in question (IV Tr. 286-288) are included as an appendix to this brief in opposition.

violated the "exclusionary rule" set forth in 26 U.S.C. 5848.[8] That contention is without merit.

We note initially that petitioner's contention has no relation to the nine false statement counts and that his sentence does not meaningfully depend on his convictions for the violations of 18 U.S.C. 545. Moreover, the exclusionary rule of Section 5848(a) only prevented the government from using the documents in question against petitioner "in a criminal proceeding with respect to a violation of law occurring prior to or concurrently with the filing of the [documents]" (emphasis added).[9] As charged in the indictment, petitioner's violation of the smuggling statute (18 U.S.C. 545) did not occur until some time after he submitted the false applications for permits to import the guns. Accordingly, the government's use of those documents in connection with the smuggling charges was not barred by Section 5848.

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[8]Section 5848 provides:

(a) General rule. - No information or evidence obtained from an application, registration, or records required to be submitted or retained by a natural person in order to comply with any provision of this chapter or regulations issued thereunder, shall, except as provided in subsection (b) of this section, be used, directly or indirectly, as evidence against that person in a criminal proceeding with respect to a violation of law occurring prior to or concurrently with the filing of the application or registration, or the compiling of the records containing the information or evidence.

(b) Furnishing false information. - Subsection (a) of this section shall not preclude the use of any such information or evidence in a prosecution or other action under any applicable provision of law with respect to the furnishing of false information.

[9]As petitioner notes (Pet. 40-41), Section 5848(a) was enacted to eliminate the self-incrimination problems presented by the firearms reporting regulations. The Self-Incrimination Clause does not protect declarations relating to future crimes. See United States v. Apfelbaum, 445 U.S. 115, 129-130 (1980).

the disposition of those applications.[6] Indeed, petitioner, an experienced arms dealer, expressly recognized that "the guns would have to be called Guatemalan in order to allow them to be imported * * * into the U.S." (I Tr. 95).[7]

Thus, the materiality of petitioner's statements was clearly established, and there is no reason to believe that any other court of appeals would have granted petitioner the relief he seeks. To whatever extent a conflict may exist concerning whether materiality is a question of law to be decided by the court, the present case does not provide an appropriate occasion for this Court to address it.

4. Petitioner contends (Pet. 40-45) that use of his false applications to show that guns were imported "fraudulently" and "contrary to law," in violation of 18 U.S.C. 545,

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[6]For the same reason, petitioner's false statements concerning the country in which the guns were manufactured made on his "Application(s) for Tax-exempt Transfer of Firearm and Registration to Special (Occupational) Taxpayer" (Counts 6 through 8) (see 27 C.F.R. 179.88), were capable of influencing the government and thus were material.

[7]Petitioner's argument (Pet. 36) that there could be no finding of materiality because there was "no evidence of any reliance" on his statements is frivolous. The settled rule is that " '[a] material false statement * * * is one that is capable of affecting or influencing * * * a government function' " and "the fact that it did not actually influence the Government is immaterial." United States v. Lichenstein, 610 F.2d 1272, at 1274-1275 (quoting United States v. Lichenstein, 610 F.2d 1272, 1277-1278 (5th Cir.), cert. denied, 447 U.S. 907 (1980); emphasis in original). In any event, petitioner's false statements actually influenced the disposition of his import applications, since he received permission to import the weapons. Cf. United States v. Poorbaugh, 593 F.2d 346, 350 (8th Cir.), cert. denied, 441 U.S. 936 (1979) (defendant who applied for and received illegal payments is not in a position to assert that his false statement was not material on the ground that it was incapable of producing illegal payments).

Petitioner cites no case, and we are aware of none, in which a court has overturned a conviction under 18 U.S.C. 1001 on the ground that the issue of materiality was not submitted to the jury. The Ninth Circuit has held in two cases that the trial court erred in itself deciding the question of materiality rather than submitting it to the jury, but in both cases it affirmed the convictions because it was clear that the statements at issue were material. See United States v. Valdez, supra, 594 F.2d at 728-729; United States v. Eaxi, 416 F.2d 351, 354-355 (9th Cir. 1969). The Tenth Circuit has not addressed the question whether a trial court commits reversible error by deciding the question of materiality. See United States v. Irwin, supra, 654 F.2d at 677 n.8, and cases cited therein; United States v. Wolf, 645 F.2d 23, 25 (10th Cir. 1981).

Contrary to petitioner's claim (Pet. 35-37), there can be no doubt that his false statements on applications to import firearms were material, *i.e.*, that they "had a 'natural tendency to influence, or [were] capable of affecting or influencing, a governmental function.' " United States v. Diaz, 690 F.2d 1352, 1357 (11th Cir. 1982), quoting United States v. Markham, 537 F.2d 187, 196 (5th Cir. 1976), cert. denied, 429 U.S. 1041 (1977). Treasury and State Department regulations require arms dealers to submit an application for a permit to import firearms or ammunition into the United States. 27 C.F.R. 178.112(b); 22 C.F.R. 123.02. A dealer must identify the country in which the firearms were manufactured on the application. 27 C.F.R. 178.112(b). Applications for permits to import regulated firearms originating in communist-bloc countries will be disapproved. 27 C.F.R. 47.52(a); 22 C.F.R. 126.01. Thus, petitioner's misrepresentation that the submachine guns were manufactured in Guatemala was "capable of affecting or influencing"

1983).[4] However, he suggests that the better rule is found in the Ninth and Tenth Circuits, which have approved the practice of submitting the question of materiality to the jury. See, e.g., United States v. Irwin, 654 F.2d 671, 677 n.8 (10th Cir. 1981), cert. denied, 455 U.S. 1016 (1982); United States v. Valdez, 594 F.2d 725, 729 (9th Cir. 1979). This Court recently denied certiorari in a case presenting the same contention. Isenberg v. United States, No. 82-967 (May 16, 1983).[5] Review of the issue is likewise unwarranted in this case.

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[4]The great weight of authority among the circuits is consistent with the view that materiality is a question of law to be decided by the court in a prosecution for violation of 18 U.S.C. 1001. See, e.g., United States v. Abadi, 706 F.2d 178, 180 (6th Cir. 1983), cert. pending, No. 82-1954 (filed June 2, 1983); United States v. Richmond, 700 F.2d 1183, 1188 (8th Cir. 1983); United States v. McInnosh, 655 F.2d 80, 82 (5th Cir. 1981), cert. denied, 455 U.S. 948 (1982); United States v. Bernard, 384 F.2d 915, 916 (2d Cir. 1967); United States v. Ivey, 322 F.2d 523, 529 (4th Cir.), cert. denied, 375 U.S. 953 (1963); United States v. Clancy, 276 F.2d 617, 635 (7th Cir. 1960), rev'd on other grounds, 365 U.S. 312 (1961); Weinstock v. United States, 231 F.2d 699, 703 (D.C. Cir. 1956). See also 2 E. Devitt & C. Blackmar, Federal Jury Practice and Instructions § 28.09 (3d ed. 1977 & Supp. 1980).

This Court has recognized that the materiality of false statements generally is a question for the court. In Sinclair v. United States, 279 U.S. 263, 298 (1929), construing the pertinency requirement of a statute prescribing refusal to answer questions by congressional committees, the Court stated:

> The question of pertinency * * * was rightly decided by the court as one of law. It did not depend upon the probative value of evidence. That question may be likened to those concerning relevancy at the trial of issues in court, and it is not essentially different from the question as to materiality of false testimony charged as perjury in prosecutions for that crime. Upon reasons so well known that their repetition is unnecessary it is uniformly held that relevancy is a question of law. * * * And the materiality of what is falsely sworn, when an element in the crime of perjury, is one for the court.

[5]The same issue is also raised in Abadi v. United States, No. 82-1954 (filed June 2, 1983), now pending before the Court.

out (Pet. App. A14), petitioner's argument "confuses the subjective standard given by the court, for the element of knowingly, with the objective element of falsity in fact." In fact, as the court further noted (id. at A13-A14), "the record [shows that] the [trial] court went to great lengths to explain the subjective standard of 'knowingly' so as to demonstrate to the jury the difference between this element and the element of 'falsity in fact.' " Considered in the context of the instructions as a whole, the supplemental instruction could not have suggested to the jury that the falsity of petitioner's statements was not an element of the offense.

3. Petitioner further contends (Pet. 35-40) that the trial court erred in not submitting the issue of materiality to the jury and that there was insufficient evidence of the materiality of his false statements. We note at the outset that petitioner did not raise these contentions in the court of appeals.[3] Absent exceptional circumstances not present in this case, this Court will not review an argument that was not raised in the courts below. See United States v. Lovasco, 431 U.S. 783, 788 n.7 (1977); Adickes v. S.H. Kress & Co., 398 U.S. 144, 147 n.2 (1970); Lawn v. United States, 355 U.S. 339, 362-363 n.16 (1958). In any event, petitioner's contentions are without merit.

Petitioner acknowledges (Pet. 38) that the rule in the Eleventh Circuit and in a number of other circuits is that materiality is a question of law to be decided by the court in a prosecution for violation of 18 U.S.C. 1001. See, e.g., United States v. Fern, 696 F.2d 1269, 1274 (11th Cir.

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[3]Petitioner states (Pet. 18, 35) that he contended in the court of appeals that there was a failure of proof on the issue of materiality. However, that argument does not appear in his court of appeals brief and was not addressed in the court's thorough opinion. Petitioner does not contend that he challenged in the court of appeals the trial court's failure to submit the issue of materiality to the jury.

2. Petitioner's related contention (Pet. 30-35) that the trial court instructed the jury that it did not have to find that his statements were in fact false is also insubstantial. Petitioner concedes (Pet. 30) that the trial court correctly told the jury several times that "[a] statement is false [within the meaning of Section 1001] *if it was untrue when made* and was then known to be untrue by the person making it or causing it to be made" (Pet. App. A11-A12; emphasis added). But he contends (Pet. 32-34) that the trial court's supplemental instruction to the jury[2] was in effect an instruction that the sole issue for its consideration was petitioner's subjective belief that his statements were false, not whether they were in fact false. However, that supplemental instruction was directed to the issue of knowledge, not the issue of actual falsity. As the court of appeals pointed

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[2]The supplemental instruction was given in response to the jury's question about the meaning of the phrase "when in truth and fact" petitioner knew he was referring to guns manufactured in the Soviet Union, contained in the indictment. The instruction provided in part (IV Tr. 319-320):

> Now, the way that an indictment is prepared doesn't track the exact language of the statute. It includes language that's not in the statute. To the extent that the indictment does, that language is what we call surplusage, it's unnecessary. There's nothing in that statute that says "in truth and fact." So that language is just extra. That's the reason it wasn't explained to you before. The question, if you want to boil that down to common sense language, it's just telling you in legal mumbo-jumbo, you might appropriately call it, that when Roger Alan Cox signed that form, it alleges that he then knew that as to his knowledge the guns in question were not made or manufactured in Guatemala. We're looking at what he believed at the time, not what anybody else believed. We're not here determining after the fact, the truth of the origin of those weapons. We're not here in a gun case. We're here determining what Roger Cox believed the place of manufacture of those guns was when he filled out that form. If he did not believe them to really be made in Guatemala and he put it on the form, then that obviously would be a falsity; would be something that he knew at the time in question.

to the making of the false statements, and to claim that the statutory bar is thus inapplicable, as the Government does here. The acts were parts of an indivisible continuum, and the statutory bar must apply.

CONCLUSION

For all of the reasons stated herein and in petitioner's main submission, petitioner respectfully prays that the Court grant his petition.

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argument. He argues that 26 U.S.C. §5848 applies only to violations of law occurring prior to or concurrently with the filing of the documents and that the smuggling charge occurred "after" the submission of the allegedly false applications. This argument would render the statutory bar a nullity.

Forms completed in connection with the importation of firearms are one step in the importation process; one completes those forms only to import the firearms. The smuggling charge here was premised entirely on the importation of weapons based on allegedly false statements in those forms. Under these circumstances, it is senseless to separate the making false statements charge from the smuggling charge, to argue that the smuggling offense occurred subsequent

rehearing in the Court of Appeals, petitioner's first point was titled "Materiality and Specific Intent."

Only the conflict in the Circuits was not raised below. Because the Eleventh Circuit has uniformly adopted the position that materiality is a question of law for the court while the Ninth and Tenth Circuits adopt a different rule, it is for this Court to resolve the conflict, not for the Eleventh Circuit.

In this regard the Government's reference to several recent cases which have also raised the issue of the conflict in the Circuits reconfirms the need for the grant of the writ of certiorari to resolve the conflict.

Finally, on the question of the statutory bar, the Solicitor General makes an interesting but unacceptable

misstated the claim as one involving petitioner's belief and it addressed that issue. Again, even if petitioner believed the guns were of Soviet origin that is insufficient for a conviction. The issue must still be presented to the jury as to whether in fact the statement was false. The Court of Appeals never addressed this issue.

Third, contrary to the Solicitor General's argument, the issue of materiality was raised below. Petitioner's first point on appeal argued that "The importation of the firearms in question was not unlawful." (pp. 12-17). Although not phrased in terms of materiality, in essence this was an argument concerning the materiality of the alleged false statement. In his petition for

Second, the issue is not whether there was or was not sufficient evidence to prove either that the guns were manufactured in the Soviet Union or even that the guns were not manufactured in Guatemala. Similarly, the issue is not the sufficiency of evidence as to petitioner's belief in where the guns were manufactured. Rather, the issue is whether a conviction can stand where falsity in fact, an essential element of the crime, is not presented to the jury. The supplemental charge to the jury quoted by the Solicitor General (p. 4) is a clear statement by the trial court that the issue of falsity in fact was not before the jury. In addition, reliance on the Court of Appeals' decision in this context is most inappropriate. The Court of Appeals

smuggling large quantities of submachine guns which he knew were manufactured in the Soviet Union into the United States. The actual facts were quite different. Petitioner purchased five 45-year-old collector machine guns which were imported, not from the Soviet Union, but from Guatemala.

The Solicitor General further makes it appear as if it was conceded that petitioner, a gun dealer, knew the machine guns were of Russian origin. Again the testimony is clear that the machine guns were of Russian design. Therefore, petitioner's calling them Russian was not a reference to place of manufacture (copies of weapons designs are manufactured in many countries), but to the type of weapon.

Immediately after the supplemental instruction was given the jury returned a verdict of guilty.

The impropriety of predicating a conviction solely upon petitioner's belief, existing the need to prove objective falsity, was exacerbated here by the fact that petitioner was precluded from showing at trial that it was difficult to know the place of manufacture because the CIA, as part of a clandestine operation in Guatemala, had introduced "remanufactured" weapons with intentionally misleading markings.

ARGUMENT

The Solicitor General's brief in opposition is misleading in a number of material respects. First, it creates the impression that petitioner was a major transgressor of the foreign policy of the United States by

the statements was withdrawn from the jury. The Government claimed that petitioner's statement that certain guns were manufactured in Guatemala was a misstatement because in truth and fact the guns were manufactured in the Soviet Union. At trial, the Government was unable to prove the place of manufacture. The trial court thereupon instructed the jury in a supplemental instruction that the place of manufacture was not an issue in the case. Rather, according to the trial court, the only issue was petitioner's belief.

> "We're not here determining after the fact, the truth of the origin of those weapons. We're not here in a gun case. We're here determining what Roger Cox believed the place of manufacture of these guns was when he filled out that form."